

MANDATE

16-704
United States v. Cuello

N.Y.S.D. Case #
15-cr-0219(RJS)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of July, two thousand seventeen.

PRESENT: DENNIS JACOBS,
PIERRE N. LEVAL,
REENA RAGGI,
Circuit Judges.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: July 28, 2017

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UNITED STATES OF AMERICA,
Appellee,

-v.-

16-704

NOEL CUELLO,
Defendant-Appellant.

- - - - -X
FOR APPELLANT:

GLENN A. GARBER (Robert
Rickner, on the brief), Glenn
A. Garber, P.C., New York, NY.

FOR APPELLEE:

DANIEL C. RICHENTHAL (Anna M.
Skotko, on the brief),

Assistant United States
Attorney, for Joon H. Kim,
Acting United States Attorney
for the Southern District of
New York, New York, NY.

Appeal from a judgment of the United States District Court
for the Southern District of New York (Sullivan, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND
DECREED** that the judgment of the district court be **AFFIRMED**.

Defendant-appellant Noel Cuello appeals from a judgment of
the United States District Court for the Southern District of
New York (Sullivan, J.) convicting him on a guilty plea of
conspiracy to commit wire fraud in violation of 18 U.S.C.
§ 1349, and sentencing him principally to 108 months'
imprisonment. On appeal, Cuello argues that the government
breached the plea agreement, and he asks to be resentenced
before a different judge. We assume the parties' familiarity
with the underlying facts, the procedural history, and the
issues presented for review.

Cuello's plea agreement contains several provisions that
bear on this appeal. First, the parties stipulated to a
Guidelines range (the "Stipulated Guidelines Range") of 78 to
97 months' imprisonment. This range reflected a sentencing
enhancement for the number of victims, but not for the
sophisticated means employed in the commission of the offense.
Second, it was agreed that "neither a downward nor an upward
departure from the Stipulated Guidelines Range . . . is
warranted," and that "neither party will seek any departure or
adjustment pursuant to the Guidelines that is not set forth
herein . . . [n]or . . . suggest that the Probation Office or
the Court consider such a departure or adjustment under the
Guidelines." J.A. 83-84. Third, the agreement permitted
either party to "seek a sentence outside of the Stipulated
Guidelines Range based upon the factors to be considered in
imposing a sentence pursuant to [18 U.S.C. §] 3553(a)," to
"present to the Probation Office or the Court any facts relevant
to sentencing," and to "make any arguments regarding where
within the Stipulated Guidelines Range (or such other range as

the Court may determine) the defendant should be sentenced." J.A. 84. Finally, the parties agreed that if the Probation Office or the district court -- neither of which was bound by the Stipulated Guidelines Range -- were to contemplate any adjustments, departures, or calculations not incorporated in the plea agreement or any sentence outside of the Stipulated Guidelines Range, each could properly "answer any inquiries and . . . make all appropriate arguments concerning the same." J.A. 84.

Cuello argues that the government breached the plea agreement by objecting to the Draft Presentence Report's omission of a number-of-victims enhancement (which was included in the plea agreement) while not objecting to the inclusion of a sophisticated-means enhancement (which was omitted from the plea agreement). After Cuello failed to submit any objections or respond to the government's objection, the final Presentence Report ("PSR") included both a number-of-victims enhancement and a sophisticated-means enhancement. The two enhancements, both adopted by the district court, brought the Guidelines range to 97 to 121 months (higher than the Stipulated Guidelines Range of 78 to 97 months).¹

Cuello contends that the government also breached the plea agreement at the sentencing hearing. Specifically, he points to the government's request for a sentence of "at least as long as 97 months," J.A. 325, and its introduction of damaging facts, including Cuello's involvement in a separate tax fraud scheme, his lack of candor with law enforcement, and his possession of firearms.

This Court "review[s] interpretations of plea agreements de novo and in accordance with principles of contract law." United States v. Riera, 298 F.3d 128, 133 (2d Cir. 2002). "To determine whether a plea agreement has been breached, we look

¹ At the sentencing hearing, the district court acknowledged that the parties' agreement did not provide for a sophisticated-means enhancement. However, the court concluded, and defense counsel agreed, that such an enhancement was appropriate. In fact, defense counsel stated that the PSR was "accurate." J.A. 336.

to the reasonable understanding of the parties as to the terms of the agreement.” Id. (internal quotation marks and brackets omitted). “[B]ecause plea bargains require defendants to waive fundamental constitutional rights, prosecutors are held to meticulous standards of performance.” United States v. Vaval, 404 F.3d 144, 152-53 (2d Cir. 2005).

Where, as here, a defendant did not object in the trial court to the government’s alleged breach of the plea agreement, we review for plain error. United States v. MacPherson, 590 F.3d 215, 218 (2d Cir. 2009). That is a high bar. See Puckett v. United States, 556 U.S. 129, 135 (2009).

No plain error was committed. It is by no means plain that the government’s conduct violated the plea agreement. With respect to the Draft Presentence Report, the government was not bound to remain silent regarding the omission of an enhancement (for the number of victims) that the parties agreed was applicable. Nor was it bound to object to an enhancement (for sophisticated means) not included in the parties’ agreement. Contrary to Cuello’s contention, the government’s failure to object to this enhancement did not amount to an impermissible “suggest[ion] that the Probation Office or the Court consider . . . a departure or adjustment under the Guidelines.”² J.A. 84. See United States v. Lawlor, 168 F.3d 633, 637 (2d Cir. 1999) (“[T]he government’s failure to object to the PSR did not constitute a breach of the plea agreement.”); cf. United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1993) (per curiam) (stating that the government did not breach the plea agreement because “no provisions in the agreement remotely compel the government to justify to the court conclusions agreed to by the parties in the plea agreement or make any representations on [the defendant’s] behalf at sentencing”).

With respect to the government’s advocacy at sentencing, we similarly identify no breach. The plea agreement permitted

² The government explained in its sentencing submission that it took no position as to whether a sophisticated-means enhancement applied. At the sentencing hearing, it was defense counsel, not the government, that stated that this enhancement applied.

the government's request for a sentence of "at least as long as 97 months," J.A. 325, after the district court calculated a 97-to-121-month Guidelines range and asked the parties to address the § 3553(a) factors. See J.A. 84 (permitting either party to: "seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to [18 U.S.C. §] 3553(a)"; "make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced"; and "answer any inquiries and . . . make all appropriate arguments concerning" the court's contemplation of a "sentence outside of the Stipulated Guidelines Range"). The plea agreement likewise allowed the government to introduce facts that were relevant to sentencing. See id. (permitting either party to "present to the . . . Court any facts relevant to sentencing").

Accordingly, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

 

A True Copy

Catherine O'Hagan Wolfe, Clerk

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United States Court of Appeals, Second Circuit

 